



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 1 OF 2015

GEORGE OPIYO1ST PETITIONER

GEORGE OCHIENG 2ND PETITIONER

GEORGE OKINYO 3RD PETITIONER

VERSUS

DEPUTY COUNTY COMMISSIONER, GEM 1ST RESPONDENT

PAULINE APONDI 2ND RESPONDENT

JUDGMENT

1. The petitioner **GEORGE OPIYO, GEORGE OCHENG** and **JOHN OKINYO** through a petitioner dated 8th September, 2015 challenges the constitutionality of the appointment of the 2nd Respondent **PAULINE APONDI** Assistant Chief of Ulamba Sub-Location by the 1st Respondent the Deputy County Commissioner, Gem, Siaya County.

2. The basis of the petitions is that the 1st Respondent in appointment of the 2nd Respondent contravened **Article 47 of the constitution**, acted unprocedurally and was not fair as the appointment was not done in the best interest of the people of Ulamba sub-Location as the Sub-Location is inhabited by numerous thugs who have caused the area to have run away insecurity leading to loss of lives, that the 2nd Respondent has always stayed away of Ulamba by staying in Sudan and therefore not well conversant with the area and given this tedious nature of the work which also requires for both day and night patrols, she will not be in a position to effectively perform the task needed, that due to the large size of the location and terrain it calls for a stronger personality to manage it. That the 1st Respondent and appointing committee failed to exercise due diligence when appointing the 2nd Respondent by failing to find out whether the 2nd Respondent would be in a position to fully execute her duties notwithstanding her qualifications as there was conflict of interest as interviewers are believed to be relatives of the 2nd Respondent. The Petitioner stated that the petition is brought in good faith and for the best interest of the people of Ulamba sub-location.

3. It is the Petitioner's case that the violated constitutional provisions are interalia as follows:- the principles of natural justice, access to service under **Article 6 (2) of the Constitution** by 2nd Respondent, the right to fair administrative action under **Article 47 of the constitution** by the 1st Respondent, the right to Security of the person as per **Article 29 of the constitution**, violation of Principle of sovereignty, supremacy of the constitution and judicial authority under **Article 1 and 2 of the constitution** by the 1st Respondent, the right to legitimate expectation under the preamble, and **Articles 6, 10, 20, 22, 23 & 48 of the constitution** by the 1st Respondent.

4. It is the Petitioners case that the particulars of the violation are interalia, that the rules of natural justice were not observed, by the 1st Respondent throughout the process used in appointing the 2nd Respondent as the Assistant Chief of Ulamba sub-location, that the 1st Respondent in appointing the 2nd Respondent did so without consulting and cooperating with people of Ulamba and as that denied them the right to access of Public Services.” that the 1st Respondent violated the petitioner's right to fair administrative action by entrapping the 2nd Respondent as the Assistant Chief without Consultation before reaching a final decision which is likely to affect other people as the 2nd respondent cannot handle the area considering she does not know its geographical boundaries as she has always stayed out of its jurisdiction, that the right to security of the persons as enshrined in the Constitution has been violated by the 1st Respondent by appointing someone who is not principally qualified to handle the insecurity in Ulamba sub-location due to inhabits of numerous thugs, that the constitution is the supreme law and the 1st respondent has violated the principle of sovereign, supremacy of the constitution Article 1 & 2 of the constitution, that the 1st respondent breached Articles, 6, 10, 20, 22, 23 and 48 of the constitution by appointing and declaring the 2nd Respondent area Assistant Chief without due consideration being given to the people of the area and that infringing on their right to legitimate expectation for the citizens as the right to access public services being threatened and that the acts by the 1st Respondents are illegal, unconstitutional, null and void *ab initio* on the ground that the 1st Respondent has not consulted nor cooperated with the people to fulfill their expectations as the residents of Ulamba sub-location.

5. The Petitioners therefore prayed for the following reliefs and orders:

(a) A declaration that Appointment of the 2nd Respondent has and is null and void and a fresh appointment be done.

(b) Any other order that the Court may deem fit and just to grant.

(c) Cost of this petition to be borne by the Respondent.

6. The petitioner's petition is supported by affidavit in support of the petition by George Opiyo who has sworn an affidavit on his behalf and that of his co petitioners. He attached his co-petitioner's consent marked GO – 1. It is deponed that the petition is brought for and on behalf of the people of Ulamba sub-location who are displeased and dissatisfied with the actions of the 1st Respondent who appointed the 2nd Respondent without any consultation and in support he attached annexure GO – 2 being a copy of signatures from people of Ulamba sub-location showing consent to this matter, that the position of Assistant Chief in Ulamba sub-location was advertised on 4.2.2015 as per attached document attached and marked G.O. 3, that it is further deponed though the 1st Respondent appointed the 2nd Respondent as the Assistant Chief and who though academically qualified to such position, she is not practically qualified to handle the area of Ulamba sub-location leaving out the two qualified people and attached copy of notice welcoming them new Assistant Chief as G O – 4, that the sub-location is in an area at boundary of Ngiya Market hence its inhibited by numerous thugs who has caused the area to have runaway insecurity and that due to insecurity the deponent averred he know many people have lost their lives amongst them a known Odhiambo Opiyo who was killed at Ngiya Market on 29th August, 2015 amongst many others.

7. It is further deponed by George Opiyo, the 1st petitioner, that the 2nd Respondent as the Assistant Chief has always stayed outside the jurisdiction of the area by staying at Sudan hence she is not well conversant with the area and given the nature of job which is tedious and requires both day and night patrols, she will not be in a position to effectively perform the task needed, as Ulamba sub-location is quite big and can carry around three ordinary sub-locations and its terrain is also tough with wide bushes and hills so that it calls for stronger personality to manage. It is deponed further that the 1st Respondent failed in exercising due diligence in finding out whether the appointed Assistant Chief could be in a position to fully execute her duties notwithstanding her qualification and concluded by annexing G O – 5 being a copy of various petitions made in opposition to the appointment of the 2nd Respondent.

8. The Respondents are opposed to the petition. They filed a Replying Affidavit to the petition sworn by Francis Kahindi Kazungu, the Deputy County Commissioner, Gem, the 1st Respondent.

9. The Respondents contend that office of the Assistant Chief, Ulamba sub-location fell vacant after the death of the office bearer on 18th June 2014 (attaching a copy of letter dated 5th August, 2015, supporting the vacancy marked “FKK1”), that by letter dated 22nd January, 2015 marked “FKK2” the Regional coordinator, Nyanza Region authorizing the office of 1st Respondent to advertise for the vacant position, that the advertisement was made on 4th February, 2015 indicating clearly the qualifications for the post, that in deriving the qualification for the position, the scheme of service for Chiefs and Assistant Chief was followed (see attached and marked “FKK4” a copy of the scheme of service).

10. It is further contended that the 2nd Respondent was among the candidates whose applications were received and shortlisted. That the 2nd Respondent was interviewed by a properly constituted panel assisted by the 1st Respondent and the 2nd respondent recommended for appointment as Assistant chief Ulamba sub-location having scored the highest marks in various requirements for the post (see attached summary of the aggregate points scored by the candidate marked “FKK5, that on 27th July, 2015 the 1st Respondent was authorized by the Regional coordinator to effect the appointment of the 2nd Respondent as Assistant Chief Ulamba sub-location (see attached copy of the letter marked “FKK6”

It is Respondents case due process was followed in appointing the 2nd Respondent and as such they contend the petitioners allegation of violation of constitutional rights are baseless. The 1st respondent has further deposed in appointing the 2nd Resplendent, other qualifications were considered besides academic qualifications. That the petitioners has already passed judgment on the

2nd respondent without going far the opportunity to carry out her duties, then the petitioner's allegations of biasness and conflict of interest are unfounded as they have not demonstrated or indicated which interviewer was a relative to the 2nd Respondent as they alleged, deposing that he is advised by the State Counsel the petition violates the provisions of **Article 27 of the constitution** on equality and freedom from discrimination, that the petition is based on malicious and baseless allegations which the petitioners cannot seek to validate through their annexure here “GO2” to the petition.

11. The Respondents further in their affidavit contend the the 2nd Respondent by virtue of being married to someone who hails form Ulamba sub-location and being a resident of the area qualified to be considered for the position and the allegations by petitioner that she resides in Sudan is not unsupported by evidence. That the petition is premature, an abuse of the Court process and misconceived and the respondents prayed for its dismissal. The Respondents have further contended the petitioners have not demonstrated how the 2nd Respondent's appointment has violated their constitutional rights to security and has come to Court with unclean hands.

12. When the petition came up for hearing the Court gave direction with consent of Counsel that the petition be determined by way of written submissions supported by authorities. The petitioners submissions were filed on 11th November, 2015 by the firm of M/s. Amondi & Co. Advocates whereas the Respondents submission were filed on 10th November, 2015 by M/s. Janet Langat, Principal Litigation Counsel for Hon. Attorney General.

13. The Counsel for petitioners M/s. Amondi & Co. Advocates submitted that the 1st Respondent being a State Officer was bound under **Article 232 of the Constitution** to involve the people in the process of Policy making and under **Article 232(g)** when filling the vacancy of the Assistant Chief Ulamba sub-location. That the constitutionality of appointment of the 2nd Respondent as an Assistant Chief is challenged as it did not meet the threshold as envisaged under **Article 2(1) of the Constitution**. The Petitioners Counsel submitted further that the 1st Respondent failed to appreciate that pursuant to **Article 73 (2) of the constitution** and **Section 22 of the Public Officer, Ethics Act**, the guiding principle in making public appoint, is competence and suitability which the 2nd Respondent lacks.

14. The Petitioner's Counsel submitted further that the 1st Respondent failed to appreciate that by **Article 10 (2) of the constitutions** he was bound to involve the participation of the people of Ulamba sub-location in a process that is so pertinent to them as to ensure protection of their human dignity and that fundamentally right to life referring to annexure GO-5 5(1) (2) and (5) to demonstrate the serious insecurity situation in Ulamba and why the petitioners feel the 2nd Respondent is not qualified. It is

further submitted that the documents and complaints by the petitioners show the deteriorated security position compromises their right to security of the person **Contrary to Article 29 of the Constitution** and as such it is argued that all the more reason as to why it was important that the participation of the people before be factored in the recruitment process. It is submitted that there was no public participation in the entire process as envisaged under **Article 10 (2) (a) of the constitution of Kenya 2010**. They further urged the 1st Respondent has not demonstrated that he provided an opportunity to the petitioners or anyone else to raise any concerns about the suitability or otherwise of the 2nd respondent through a process that allowed for public participation in the appointment. The Counsel relied on the case of **constitution Petition No. 19 of 2014 Benson Ritho Mureithi V Cabinet Secretary Ministry of Environment** and the case of **International Center for Policy and Conflict and 4 Others V. Uhuru Kenyatta and Others Petition NO. 552 of 2012**.

15. The Petitioners Counsel urged the Court to find that the 1st Respondent in carrying out recruitment for the position of Assistant Chief Ulamba sub-location failed to give due regard to the 2nd Respondent's competence and suitability as envisaged by **Article 73 in chapter 6 of the constitutions of Kenya 2010** and also in ensuring that there is in place a mechanistic to allow public participation in the process as required under **Article 10 of the constitution**. He prayed the appointment of the 2nd respondent be declared null and void, a fresh appointment be done and costs be provided for.

16. The learned Principal Litigation Counsel M/s. Janet Langat, submitted on behalf of the Respondents that the petition is brought under the provisions of Article 1, 2, **6, 10, 10, 20, 24, 23, 29, 47, and 48 of the constitution of Kenya 2010**. The petitioners' grounds of the petition are that in appointing the 2nd Respondent, the 1st Respondent violated **Article 47 of the constitution** and that the process was not fair as it was not done in the best interest of the people and that the 2nd Respondent, it was alleged was not familiar with the area as she has always stayed in Sudan and due to tedious nature of the work she will not be in a position to effectively perform the task. It was also alleged the appointing Committee failed to exercise due diligence in appointing the 2nd Respondent with further allegation that some interviewers were her relatives.

17. The Learned Principal Litigation Counsel submitted on behalf of the Respondents that petition is premature, misconceived and lacks merits and that the appointment of the 2nd Respondent was undertaken in accordance with the constitution and that the petitioners violates the provision of **Article 27 of the Constitution of Kenya 2010**.

18. The learned Principal Litigation Counsel on paragraph 6, 7, 8 and 9 of the petition where the petitioners, alleged the 2nd respondent is not in a position to fully execute her duties as the area is inhabited by numerous thugs who have caused insecurity and due to tedious nature of the work requiring day and night patrol, the 2nd Respondent will not be in a position to effectively perform the tasks she submitted on behalf of the Respondents that the Petitioners' allegations are unfounded as they are not supported by any evidence submitting further the 2nd Respondent has not been in office for them to rate or judge her performance as wanting. It is further submitted that the petition is based on the petitioners personal fears which cannot be a basis to support contraventions of any constitutional rights. She submitted that the petitioners have a duty to demonstrate how their rights have been infringed by the appointment which they have failed to demonstrate. The Learned Principal Litigation Counsel referred to the case of **Anarita Karimi Njeru V. Republic [1976 – 1980] 1 KLR 1272**

19. The Learned Principal Litigation Counsel submitted on the allegation of the 2nd Respondent of staying in Sudan as without basis for want of evidence. The 2nd Respondent's residence in Sudan, it was submitted has not been proved and neither has the alleged residence of Sudan been shown as a contravention of the petitioners rights referring to the case of **Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR at paragraph 66 & 67** of the judgment.

20. The Learned Principal Litigation Counsel on appointment of the 2nd Respondent submitted that in appointing the 2nd Resplendent due process was followed,submitting the 1st Respondent has demonstrated he had authority to advertise for the position, which he did and the advertisement contained all the requirements/qualifications for the post in respect of the schemes of service for Chiefs and

Assistant Chiefs. That out of all the requirements the petitioners challenged the 2nd Respondent is not a resident of Ulamba sub-location but resides in Sudan.

21. It is further submitted the petitioner, seems not to attack the procedure adopted by the Respondent but the substance of the appointment process itself. In that regard the Learned Principal Litigation Counsel referred to the Court to the case of **Trusted Society of Human Rights Alliance V. The A.G. Petition NO. 229 of 2012 eKLR and the case of Mumo Matemu V. Trusted Society of Human Rights Alliance (Supra)**. The Learned Principal Litigation Counsel in reliance on the above, mentioned cases submitted that due process and conformity with the constitutions was followed as the 2nd Respondent emerged the top in the categories that had been used in the selection process. Referring to annexure “FKKJ” which showed that the 2nd Respondent emerged 1st with 398 points and the Panel arrived at the decision to appoint her. Referring to the case of **Kenya Youth Parliament and 2 Others V. A.G. & Another, Constitutional Petition No. 101 of 2011**.

22. The Learned Principal Litigation Counsel submitted that the Petition violates the provisions of **Article 27 of the Constitution of Kenya 2010** which sets out the right of equality and freedom from discrimination. The Counsel submits the petitioners, have discriminated against the 2nd Respondent by virtue of her being a woman in total and gross violation of the provisions of **Article 27 (3) (4) & (5) of the Constitution**. In support of this point the Learned Principal Litigation Counsel referred to Petitioner's annexation “GO 4” which stated:

“If a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed.”

23. I have carefully considered the petitioner's petition, the affidavit in support, the 1st Respondent's Replying Affidavit, The Petitioners' Counsel submission and submissions by the Learned Principal Litigation Counsel for the Respondents. Having considered the petitioners, the submissions it is my considered view that the petition raised the following issues for determination:-

(i) Whether the appointment of the 2nd Respondent was in accordance with the constitution and the law:

(ii) Whether the petitioners Petition is premature, misconceived and lacks merits.

(iii) Whether the petition violates Article 27 of the Constitution.

24. The Petitioners in their petition rely on Articles **1, 2, 6, 10, 20, 21, 22, 23, 29, 47 and 48 of the Constitution of Kenya 2010**, however the petitioner's counsel in his submissions sought to rely on **73 (2) of the constitution of Kenya 2010** which is not one of the Articles stated on the face of the petition and the body of the petition. In the case of **Anarita Karimi Njeru V. Republic (1976 – 1980) 1 KLR 1272**, the Court addressed itself thus:-

(quote page 3 of Respondents Counsel submission)

25. It is important in this judgment before I proceed this to point out the petitioner's Counsel has in his submissions not only introduced **Article 73(2) of the Constitution** which is not on the face of the petition nor is there any single paragraph in the petition or in the supporting affidavit stating that the 1st Respondents failed to appreciate **Article 73 (2) of the Constitution of Kenya** being a guiding principle in making public appointments thus competence and suitability but that notwithstanding, I will proceed on to deal with in this petition.

26. The Petitioners Counsel in his submission relied on Article 232 of the Constitution urging the 1st Respondent being a State Officer was bound to involve the people in the process of policy making and ensure fair competition and merit as a basis of making appointment. The said Article is not one of the Articles relied upon in the petition nor is it set out as one of the grounds for complaint. In view of the

decision of **Anarita Karimi Njeru V. R (1976 – 1980) 1 KLR 1272** (supra) the Petitioners having not set out with reasonable degree of precision their complaints, the provisions of article **73 (2) and 232 of the constitution** alleged to have been infringed and the manner in which they are alleged to be infringed having not been pleaded I find that the petitioner cannot do so through their Counsel's submissions at this point as that would be contrary to the laid down procedure in constitutional petitions.

27. **Article 1 of the constitution** is on sovereignty of the people and **Article 1 (1) of the constitution** provides:

“ 1. (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.”

Article 2 (1) and (2) of the constitution provides:-

“ 2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution.”

29. Under **Article 10, the Constitution** sets out the notational values and principles of governance **Article 10 (2) (a) (b) (e) and (d)** provides:

“10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.”

30. **At Article 73 (1) (2) the constitution** states as follows with regard to leadership and integrity:-

“73. (1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;”

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practice”

31. The petitioners in their petition contended that the appointment of the 2nd Respondent was not procedurally fair as the same was not done in the best interest of the people of Ulamba sub-Location. It is clear from the petitioners averment, they do not attack the procedure adopted by the 1st Respondent in appointment of the 2nd Respondent but the substance of the appointment itself. The 1st respondent's contention is that he had been authorized by the coordinator, Nyanza Region to advertise for the vacant position which he did as per the annexure “FKK2” and which is not challenged or disputed by the petitioners. The advertisement dated 4th February, 2015 (annexture “FKK3”) invited applications from suitable qualified persons to fill the vacant post inviting all interested candidates, to make the applications. It contained the requirements/qualification for the post in line with the scheme of service for Chief and Assistant Chief's. The petitioners out of all the requirements challenged the 2nd Respondent's place of residence under paragraph 7 of the petition and that the 2nd Respondent is not a resident of Ulamba sub-location but resides in Sudan. The petitioners in their affidavit in support of the petition dated 8th September 2015 under paragraph 9 deponed:-

“ Ulamba sub-location is quite big and it can carry around three ordinary sub- locations and the terrain is also tough with wide bushes and hills so that it calls for a stronger personality to manage it.”

32. The petitioners averment that the 2nd Respondent has always stayed outside the jurisdiction of Ulamba Sub-Location by staying in Sudan is not supported by any documentary evidence or any evidence. It is contested by the 1st Respondent that the 2nd Respondent met the qualifications/requirements and was shortlisted amongst the candidates for the post.

33. In the case of **Trusted Society of Human Rights Alliance V. The A.G. Petition No. 229 of 2012 eKLR** in a Bench of three High Court Judges, they addressed discretions that:-

“the Court is entitled to review the process of appointment to State or Public Offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointments process includes an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the constitutional requirements.”

34. In view of the above authorities I am satisfied that the petitioners did not meet the threshold as regards proving their claim on balance of probability. In the case of **Kenya Youth Parliament & 2 Others V. A.G. & Another Constitutional Petition No. 101 of 2011** the Court of appeal stated as follows:

“we have not been shown the constitutional provisions which were violated requiring this Court's intervention. None of the Articles quoted is unclear or capable of more than one meaning. The Petitioners eventually conceded only asserting that their petition was a challenge and/or attack on the procedure and process of appointment. They failed to show any defects in that procedure and complained of as against the 2nd Respondent were not considered by all the organs responsible for the process of his appointment. Those organs arrived at decisions which this Court cannot undertake a merit review of. The 2nd Respondent having been appointed

after the prescribed due process was adhered to, even if someone else would have arrived at a different verdict, our finding is that anyone having a reason to have the Director of Public Prosecutions removed from office must comply with the requirements of Article 158(4)”

35. The petitioners are not challenging the non suitability of the 2nd Respondent on any ground other than on the ground of sex as it appears from the position. There is no allegation that the petitioners or anyone else was denied or had no opportunity to raise any concern about suitability or otherwise of the 2nd Respondent to hold the office that she was appointed to. The 1st Respondent presented to the Court letter authorizing advertisement for the position (annexture “FKK2”) advertisement (annexture “FKK3”) copy of scheme of service for Chiefs and Assistant Chief (annexture FKK4), summary of aggregate points scored by candidates (annexture FKK5) and annexture FKK6” authorization to effect the appointment the 1st Respondent deponed that there was panel of interviewers who interviewed the four candidates. The documents presented by the 1st Respondent were specially summary of the aggregate points scored by the candidate in various requirements, based on age, gender, educational qualification, intelligence, experience and their testimonials, displaying managerial ability, expression/physical fitness and presentation, current affairs, support developments projects acceptance by community, character, ability and personalty previous criminal record, public relations and other overall assessment establisher the integrity or suitability of the 2nd Respondent through a process that allowed public participation in her appointment.

36. The appointment to public office must be on the basis of the criteria set out in **chapter 6 of the constitution of Kenya 2010**. The appointment must also be in accordance with the national values and principles set out under **Article 10 of the constitution**. In the case of **Benson Ritho Mureithi (Suing on his behalf and on behalf & General Public) V J.W. Wakhungu, Cabinet Secretary Ministry of Environment & 2 Others Petition No. 19 of 2014(supra)** the Court quoted with approval from the case of **David Kariuki Muigna V. Attorney General & Another Petition No. 161 of 2011** which dealt with the appointment by Minister for Industrialization of the Chairman of the Standards Tribunal, the Court observed in that matter at paragraph 13 and 15 as follows:-

“13” However, it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of the Constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that:

“15” There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner”

37. It is my view and finding that the 1st Respondent in making the appointment of an Assistant Chief should be guided by the national values and principles set out in **Article 10 of the Constitution**, in particular participation of the people equity, good governance, integrity, transparency and accountability.

38. There is evidence from the affidavit of the 1st Respondent that the appointments of the 2nd Respondent was not done directly as there is evidence that there was a competitive process which enabled public participation in the process, and which embraced transparency and accountability under the constitution, thereby giving legitimacy to the appointment of the 2nd Respondent. In the instant matter there was authorization for the 1st Respondent to advertise for the post, there was advertisement for the post clearly indicating the qualification for the post that, there were applications from candidates, then shortlisting of candidates, interview by panel consisting of Administration and Members of Public, that the candidates were graded with the 2nd Respondent scoring 398 marks followed by number 2 with 395 and No. 3 with 336 marks. The Committee recommended the 2nd Respondent for appointment as Assistant Chief and the Regional Coordinator authorized the 1st Respondent to effect the appointment as per annexture “FKK6”.

39. The petitioners aver that the appointment was done without consultation as per annexture GO – 2.

GO2 is headed “**petition from Ulamba sub-location.**” It has names, identity card numbers with and signature. It consists of 43 names but it is silent on the nature of the petition nor is it shown to whom it is addressed. It cannot then be correctly stated that it is a petition brought for and on behalf of people of Ulamba sub-location who are displeased and dissatisfied with actions of the 1st Respondent who appointed the 2nd Respondent without any consultation. The document cannot be a petition for anything as alleged by the petitioners. The Court should not be left to speculate on the nature of the document on such a serious issue as this one. I term the document as of no evidential value in this petition. The petitioners and must ensure this candidature of post was advertisement of the post; and also admit the 2nd Respondent academically qualified but avers she has no practical qualification and positions under paragraph 9 the petitioner, confirms there was public participation through people interviewing the candidates as they allege, without proof that some interviewers were related to the 2nd Respondent.

40. In view of the foregoing I am satisfied upon evaluation of the evidence and considering the relevant provisions of the constitution and Counsel submissions that due process and conformity with the constitution was complied with as the 2nd Respondent emerged the top in the category that had been used in the selection process. The 1st Respondent made appointment of the 2nd Respondent on the basis of clear constitutional criteria and complied with Article **10 and 73 of the constitution of Kenya 2010**. The 2nd Respondent who was appointed to the position of Assistant Chief met certain integrity and competence standards as set out under chapter 6 of the constitution of Kenya 2010. I find in this petition inquiry was made with regard to the suitability of the 2nd Respondent under the provision of constitution by the 1st Respondent assisted by panel of committee which includes members of public, who represented the public. I therefore find there was public participation.

41. It was submitted by the Respondents Counsel that this petition is premature, misconceived and lacks merits as the petitioners under paragraph 6, 7, 8 and 9 of the petition urged the 2nd Respondent is not in a position to fully execute her duties as the area is inhabited by numerous thugs who have caused insecurity and due to tedious nature of the work requiring day and night patrol and that, she will not be in a position to effectively perform the tasks needed. The petitioners basis of their allegation can be drawn from the contents of their **annexture GO 4:-**

“We kindly request your attention and help in relation to vacant post of an assistant chief Ulamba sub-location. After the interview we received a report on 3.8.2015 that Mrs. Pauline Apondi one of the applicant was to be appointed an issue we rejected. We also noted that her relatives were among the interviewers and she easily colluded with them to secure the vacancy.

First and foremost, this area require a man who can help in patrol day and night as the area is riddled with insecurity, cattle theft, boundary disputes and illicit brews. From the month of January 2015 to now, at least four people have lost their lives in the hand of criminals i.e. like at boundary of Ngiya Market thugs have a habit of tying all watchmen and lid the shops and even kill, which woman cannot. We wish to inform you that the recent process of recruitment was corrupt.”

42. The Learned Advocate for the petitioners did not respond on the Respondents Counsel submission on this issue nor did he opt to reply through highlighting the issue Court when Court sought whether both sides needed to highlight on the submissions nevertheless, I will deal with the issue response notwithstanding having not been made.

43. The petitioners did not put forward any witness whether in documentary form or otherwise in support of the in assertions under paragraph 6, 7, 8 and 9. The 2nd Respondent by the time of filing of this petition it is not alleged that she had reported on duty or in office for the petitioners to have rated her performance as wanting. Their petition is based on personal preconception of the 2nd Respondent on the basis of her sex as per their annexture GO – 4, their fears and/or speculation of what may happen when the 2nd Respondent assumes office. That cannot be the basis to support their claim of contravention of any constitutional rights. The petitioners are obliged to demonstrate how their rights have been infringed by the appointment of the 2nd Respondent. They have not demonstrated in what manner then rights have been infringed. The petitioners petition as the 2nd Respondent has not assumed office and based on

paragraph 6, 8 and 9, the petition in my view is premature and lacking in merits. An Assistant Chief need not be scaling all the hills and valleys in Ulamba Sub-Location to be efficient nor does she need to be in every place during day and night to be effective. In the modern society we have advanced technology which can be used for communication and for effective and efficient administration irrespective of the size of the area under an Assistant Chief. The Assistant Chiefs also have their Assistants in security matters and what one sex can do the other can do equally the same if not better. The 2nd Respondent should therefore be given an opportunity and time to prove her worthy, rather than fighting her without allowing her to report at her office and discharge her duties.

44. The 1st issue is whether the petition violates **Article 27 of the constitution of Kenya?** The principal litigation Counsel submitted that the petitioners petition violates the provisions of **Article 27 of the constitution of Kenya 2010**. The petitioners Counsel did not make a response on this issue or sought leave to respond on the same orally. The principal litigation Counsel submitted that the petitioners in this petition are discriminating against the 2nd respondent by virtue of her being a woman in total and gross violation of the provisions by **Article 27 (3) 4, & 5 of the constitution**. She referred to petitioners annexure “G0 – 4” containing a petition to the principal security dated 23rd August, 2014, the residents of Ulamba sub- Location states:-

“First and foremost, this area require a man who can help in patrol day and night as the area is riddled with insecurity, cattle theft, boundary disputes and illicit brews. From the month of January 2015 to now, at least four people have lost their lives in the hand of criminals i.e. like at boundary of Ngiya Market thugs have a habit of tying all watchmen and lid the shops and even kill, which woman cannot.”

45. **Article 27 (1) (2) (3) (4) and (5) of the constitution of Kenya 2010** provides

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

46. The petitioners obviously from contents of their letter annexure “Go-4” (which is unsigned) have in their petition under paragraph 7 and 8 stated:

“.....th eappointed of 2nd Respondent as the Assistant Chief of the area, has always stayed outside the jurisdiction of Ulamba by staying in Sudan so she is not well conversant with the area and hence given the tedious nature of work which also requires for both day ad night patrols she will not be in a position to effectively perform the tasks needed. Ulamba sub-location is quite big and it can carry around three ordinary sub-location and the terrain is also tough with wide bushes and hills so that it call for a stronger personality to manage it. The 1st Respondent who were the appointing committee failed in exercising due diligence in finding out whether the appointed Assistant Chief would be in a position to fully execute her duties notwithstanding her qualifications and we believe there was a conflict of interest as there is information to believe that same interviewers were her relatives.”

47. It is clear in my mind as from the contents of the petitioners letter marked “GO – 4” and paragraph 7

and 8 of the petitioner's petition they are seeking to have the 2nd Respondent discriminated from the post of an Assistant Chief on the ground of being a “woman” and on the ground of “sex” to be precise.

48. **Article 27 of the constitution of Kenya 2010** embraces equality, and freedom from discrimination on the ground of sex amongst other list ground **Article 28 of the constitution** states every person has inherent dignity and the right to have that dignity respected and protected. The Article does not discriminate against women.

49. **Article 41 (1) of the constitution of Kenya 2010 provides.**

“(1) Every person has the right to fair labour practices.”

Article 25 (a) (b) of the constitution on fundamental rights and freedom that might be limited provides.

“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;”

50. The petitioners in their petition have sought to discriminate the 2nd Respondent on the ground of sex in her efforts to secure a job of an Assistant Chief. The Petitioners portray as the 2nd Respondent as weak because she is simply a woman. That she should not be offered the job because it is tedious in nature and in which one is expected to work during day and night simply because she is a woman. They have also averred as the 2nd Respondent is a woman she is not as strong as men are hence not suitable for the job.

51. In my view the petition boils down to one thing, that it is discriminatory on the ground of sex, it is against human dignity and scorn women and the 2nd Respondent and further is intended to ensure women and men should not have the right to equal treatment, including the right to equal opportunities in economic, cultural and social spheres.

52. I am of the view that in constitutional references where a petitioner is seeking to enforce his purported violated constitutional rights he should not be allowed to violate or breach and/or infringe the rights of others or another so as to have his purported right enforced. The petitioners are in my view seeking to violate, the constitutional rights of the 2nd respondent by discriminating against her. The petitioners are violating the same constitutional provisions that they have relied on to seek the redress before this Court. The petitioners should realize the 2nd Respondent has the right to equal treatment and right to equal opportunities as she is also protected by the same constitutional as they are and she should not be discriminated against by virtue of her gender or sex.

53. I therefore find and hold the petitioners petition violates the provisions of **Article 27 of the constitution** and should be dismissed.

54. The upshot is that the petitioners petition is without merits and is dismissed but as the matter raised touches on public interest each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 10TH DAY OF DECEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 10TH DAY OF DECEMBER, 2015.

In the presence of:

M/s. Odumba for the Petitioner

Mr. O. Obonyo for the Respondent.

Court Clerk – Kevin O. Akwany

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE